

U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
ENTERED
TAWANA C. MARSHALL, CLERK
THE DATE OF ENTRY IS
ON THE COURT'S DOCKET

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
ABILENE DIVISION

IN RE:

SANDY SHANE GILLEY AND
SHARON LYNN GILLEY,

DEBTORS.

§
§
§
§
§
§

CASE NO. 02-10383-RLJ-13

MEMORANDUM OPINION AND ORDER

Before the court is the question of whether the Debtors' Chapter 13 plan can be confirmed given its separate and preferential treatment of student loan claims. The Chapter 13 Trustee objects to the plan on the basis that the plan unfairly discriminates against unsecured creditors.

The Debtors' plan is a 60 month plan providing for payments of \$440 per month, resulting in a 5.6% return to unsecured creditors. The plan separately classifies the student loan of \$1,528.27 held by Todd Bremer & Lawson Inc., and the student loan in the amount of \$9,263.73 held by Texas Guaranteed Student Loan Corporation (TGSLC). The plan provides for direct payments against the student loans of \$200 per month. The Debtors and the Trustee stipulate that, if the student loan debts were not separately classified (and hence no discrimination) and thus paid pro rata with other unsecured creditors, the dividend to unsecured creditors under a hypothetical 36 month plan would increase to approximately 12%. The parties further stipulate that the \$200 direct payment on the student loans is the regular payment on the loans and that such payment will continue for a period of 10 years.

As the parties recognize, the proposed distribution under a hypothetical 36 month plan with no discrimination is based on the holding of *In re Simmons*, a recent Northern District of Texas bankruptcy court opinion. *See In re Simmons*, 288 B.R. 737 (Bankr. N.D. Tex. 2003). *Simmons* specifically addressed the issue whether section 1322(b)(1) prohibits “a [C]hapter 13 debtor from treating nondischargeable unsecured student loan obligations more favorably than dischargeable general unsecured debt.” *Id.* at 744. *Simmons* holds that

a plan in Chapter 13 does not discriminate unfairly so long as (1) the discrimination has a rational basis; and (2) the class discriminated against receives under the plan a return at least equal to what the class would have received if (a) there were no discrimination, and (b) 36 months of the debtor’s disposable income were applied to make payments under the plan.

Id. at 753.

Based on the parties’ stipulations, the Debtors’ plan here fails to meet the test articulated by *Simmons*. This court adopts the rationale and holding of *Simmons*.

Debtors argue, however, that section 1322(b)(5) specifically allows the Debtors’ proposed payment here of their student loans, despite section 1322(b)(1). *See e.g., In re Chandler*, 210 B.R. 898 (Bankr. D.N.H. 1997); *In re Sullivan*, 195 B.R. 649 (Bankr. W.D. Tex. 1996); and *In re Cox*, 186 B.R. 744 (Bankr. N.D. Fla. 1995). Section 1322(b)(5) states that the plan may,

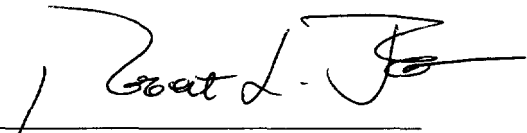
notwithstanding paragraph (2) of [the] subsection, provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due.

11 U.S.C. § 1322(b)(5) (2003).

The court cannot agree with the Debtors' argument. The unfair discrimination proscription of section 1322(b)(1) applies regardless of the treatment of long-term debt. Subsection (b)(5) applies "notwithstanding paragraph (2)," which addresses holders of secured claims, secured by the debtor's principal residence. *Id.* Maintaining payments on a long-term debt, as contemplated by paragraph (b)(5), does not constitute an exception to paragraph (b)(1).

Upon the foregoing, the court hereby denies confirmation of the Debtors' final Chapter 13 plan.

DATED: JUN 03 2003.



ROBERT L. JONES
UNITED STATES BANKRUPTCY JUDGE

The Clerk shall provide copies to:

Attorney for Debtors: Phil Black, Law Offices of Phil Black, 1290 South Willis, Commerce Plaza, Suite 222, Abilene, TX 79605; and

Chapter 13 Trustee: Walter O'Cheskey, 2575 S. Loop 289, Suite 103, Lubbock, TX 79423.